***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

74-2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of :

D. H. OVERMYER CO., INC. (Virginia) :

Debtor :

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In Proceedings for an Arrangement

No. 74-2326

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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# BRIEF OF RESPONDENT E. R. CARPENTER CO., INC. Landlord, Richmond No. 1

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| In the Matter of | : | In Proceedings for an Arrangement |
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BRIEF OF RESPONDENT
E. R. CARPENTER CO., INC.
Landlord, Richmond No. 1

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## ISSUE PRESENTED

Did the District Court err in affirming the order of Bankruptcy Judge Roy Babitt terminating the lease between the landlord and the debtor effective as of August 8th, 1973, and directing surrender of possession to the landlord effective July 31, 1974?

## PRELIMINARY STATEMENT

This is an appeal from the opinion and order of Hon. Henry F. Werker, District Judge, on October 4, 1974 (Appellant's Appendix, Vol. 1, pgs. 7-25) affirming the opinion of Hon. Roy Babitt, dated July 23, 1974 (Appellant's Appendix, Vol. 1, pgs. 26-55). On October 15, 1974, this Court permitted all parties to submit copies of their briefs filed in the appeal below to be supplemented by such further typewritten briefs as respondents may wish to file.

Attached hereto is a copy of Respondent's brief filed in the District Court, incorporated herein and intended to be a part hereof.

## STATEMENT OF THE CASE

The undisputed facts are as set forth in the Respondent's brief attached hereto. The lease dated December 9th, 1968, between the bankrupt and respondent was prepared by the bankrupt and contained provisions for termination of the lease and repossession of the premises in the event the rent was not paid (see Respondent's brief attached hereto, pgs 4-5).

## POINT I

### IT WAS NOT A CONDITION PRECEDENT EITHER IN THE LEASE OR AS A MATTER OF VIRGINIA LAW THAT AN ACTION BE COMMENCED BY THE LANDLORD IN A LOCAL COURT TO TERMINATE THE LEASE FOR FAILURE TO PAY THE RENT

Virginia law clearly affirms landlord's termination of Overmyer's lease and re-entry of the premises. Jabbour Bros. v. Hartsook, 131 Va. 176, 108 S.E. 684 (1921); Virginia Iron, Coal and Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925); Va. Code, § 55-79.

In Jabbour Bros. v. Hartsook, supra, lessor demised premises to lessee for three years. The lease provided for monthly rental payments on the first day of each month and "that if said rent shall at any time be in arrears and unpaid, ... lessor may cause a notice to be left on the premises, of his intention to determine the same, and at the expiration of ten days from the time of leaving such notice, this lease shall absolutely determine." 121 Va. 177-178. When lessee became in arrears on the rent, lessor gave notice of termination. When lessee did not cure his default within ten days, the lease terminated. Five days after the lease terminated, lessee tendered the rent arrearages which

lessor refused to accept. Holding that the lessor rightfully repossessed the premises, the Supreme Court of Virginia stated:

> "*** the tender *** of the rent in arrears, being after such termination, was too late to prevent the termination which had already occurred. ***
>
> This being so, all the other matters in controversy in the case *** become immaterial and, hence, need not be dealt with in this opinion.
>
> The seventh clause of the lease provides that if the rent shall 'at any time be in arrears and unpaid,' the lessor may terminate the lease at the expiration of ten days from the time of giving the notice, such as was given as aforesaid. Hence, neither the common law rules on the subject of what a landlord must do to terminate a lease because of non-payment of rent, nor the statute in Virginia on the subject, have any application. The subject is governed and controlled in the case in judgment by the express contract of the parties and by the action of the lessor in accordance therewith.
>
> We are, therefore, of opinion that there was no error in the action of the trial court in setting aside the verdict of the jury and in entering judgment for the lessor."

131 Va. 184-185.

Moreover, Virginia has by statute recognized a landlord's right to repossess his premises upon a tenant's default in the payment of rent:

> "Va. Code, § 55-79. Effect of provision for reentry by lessor. -- If in a deed of lease it be provided that 'the lessor may reenter for default of *** days in the payment of rent, or for the breach of covenants,' it shall have the effect of an agreement that if the rent

> reserved, or any part thereof, be unpaid for such number of days after the day on which it ought to have been paid, or if any of the other covenants on the part of the lessee, his personal representative or assigns be broken, then, in either of such cases, the lessor, or those entitled in his place at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may re-enter, and the same again have, repossess and enjoy, as of his or their former estate."

Section 55-79 expresses Virginia's policy favoring a landlord's right to repossession upon a tenant's default. And, notwithstanding § 66-79, the parties may choose to control their rights by contract -- as in the instant case."

The Appellant argues, at pgs 21-22 of its brief, that a "re-entry clause is mere security for rent" but ignores the point that the tenant must satisfy the rent due and compensate the landlord for damages (see annotation to Virginia Code, § 55-79 cited in Appellant's brief, at pg. 22). Here, the bankrupt still owes the July, 1973, rent of $10,800 as well as other damages resulting from failure to maintain the property, and the inference in Appellant's brief, at pg. 24, that "the $10,800 representing a one-month default in rent has apparently already been cured" (meaning paid) simply is not so. The July, 1973, rent has not been paid, nor was it tendered before or after the filing of the petition. Where is plaintiff's proof that it was paid or

tendered? Asking the question at the trial on April 18th, 1974, if the landlord would accept the July rent, certainly should not be construed as tendering the rent.

## POINT II

### THE BANKRUPT RELINQUISHED POSSESSION OF THE PREMISES FOLLOWING RECEIPT OF THE TERMINATION LETTER THEREBY OBVIATING THE NEED FOR COURT PROCEEDINGS

The testimony of the landlord was that the bankrupt, after receiving the termination letter of July 23rd, 1973, peacefully relinquished the warehouse to the landlord. The testimony of the resident manager and controller, Mr. Brydon, beginning at page 10 of the transcript of the record taken at the trial held before Judge Babitt on April 18th, 1973, is as follows:

> "Q. Mr. Brydon, after mailing the termination letter of July 23rd, 1973, tell the Court what then happened"
>
> A. Well basically, we just prepared, during that time period, with our lawyers in Richmond, we -- we made the determination that if they defaulted at this time, that we were through with Overmyer.
>
> We made the determination that we wanted not only to declare a state of default, but take that opportunity to terminate the lease and we therefore made preparations to terminate the lease.
>
> Q. Did there come a point in time in the early

part of August, 1973, when you peacefully repossessed the warehouse building?

A. Right, on August 8th, which was the termination date of the fifteen days, and we had not received anything.

Q. What did you do on that day?

A. We proceeded to have letters written and sent to the D. H. Overmyer Company in New York. A copy of this letter (indicating) was hand-delivered to the local manager in Richmond, and a copy of that letter plus an individual letter to each of the sub-tenants -- I believe there were seven at the time -- a copy was hand-delivered to each tenant, and if he also had an office that was different from the warehouse, a copy was posted on the warehouse door.

Q. My Brydon, having then done that, did you receive any communication from the Overmyer Company?

A. No, we never had a reply.

Q. At any time during August, September or October or November, for that matter?

A. Never.

Q. With respect to the so-called subtenants in the warehouse, did you have any communication or contact with them on or after August 8th, 1973?

A. Yes.

Q. What did that contact consist of?

A. Well, one of the provisions of the lease was that we could declare the lease terminated and take over the building and collect rents from our tenants without any judicial process. It was stipulated in the lease that we could do that.

We therefore, called a meeting of all of the subtenants on August 9th and told them at that time what

had happened and gave them the opportunity that we would offer to take them on and honor the leases that they had with Overmyer until such time as they expired. Then, we agreed we would be willing to negotiate new leases with them.

Q. Subsequent to that time, what new lease was negotiated?

A. Well, we negotiated a new lease right away but only for the period of time -- in other words, we substituted our lease for any possible Overmyer lease and -- all of our leases were drawn and completed by October 9th, except for Hoerner Waldorf Corporation, who had their own lawyer in Minnesota. They wanted some special clauses in theirs.

Q. So that on or about October 15th, 1973, the landlord had entered into the new leases with all subtenants except one?

A. That is correct.

Q. Mr. Brydon, the landlord has been collecting rent from these tenants since August 9th, 1973?

A. Correct.

Q. Since entering into new leases, the rents being paid are the rents called for by the new leases?

A. That is correct."

The argument made by the Appellant that the landlord should have instituted legal proceedings to repossess the building is meaningless in light of these undisputed facts. Furthermore, there was no reason for the landlord to invoke the bankruptcy clause contained in the lease for the reason that it was written for his benefit (not the

bankrupt's), and if the landlord chose to terminate the lease for non-payment of rent this was his right to exercise; this was done more than three months prior to the filing of the petition.

## CONCLUSION

This Court should sustain the opinion and order of Hon. Henry F. Werker, District Judge, dated October 4th, 1974, affirming the opinion of Hon. Roy Babitt, dated July 23rd, 1974, and disallow the appeal of Receiver-Appellant, Robert P. Hertzog, for the reasons herein set forth.

Respectfully submitted,

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Dated:
November 7th, 1974

John J. Abberley
Of Counsel

In Arrangement
Proceedings
73 B 1160

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

D. H. OVERMYER CO., INC. (Virginia)

Debtor

--

On APPEAL FROM AN ORDER OF JUDGE ROY BABBITT,
BANKRUPTCY JUDGE

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# APPELLEE'S BRIEF
of
E.R. CARPENTER CO., INC.
Landlord Richmond No. 1

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter
of
D. H. OVERMYER CO., INC. (Virginia)
Debtor

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On Appeal from an Order of Judge Roy Babbitt,
Bankruptcy Judge

---

# APPELLEE'S BRIEF
of
E. R. CARPENTER CO., INC.
Landlord, Richmond No. 1

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## STATEMENT

Appellant, Robert P. Herzog, receiver of certain debtors, appeals from an order of Judge Roy Babbitt, bankruptcy judge, granting judgment on August 6th, 1974, in favor of E. R. Carpenter Co., Inc. (Landlord, Richmond No. 1) against the receiver and debtors terminating a written lease dated December 9th, 1968, entered into between Carpenter Realty Corporation (now known as E. R. Carpenter Co., Inc., a Virginia corporation) as Landlord Appellee, and D. H.

Overmyer Co., Inc. as Tenant (Debtor).

Appellant claims the following errors on the part of the bankruptcy judge:

(a) Refusing to exercise his equitable power to prevent the forfeiture of valuable long-term leases owned by the debtors;

(b) Encompassing within his Opinion several litigated adversary proceedings where the bankruptcy default provisions were not at issue, but nevertheless finding against the debtors in such proceedings on the basis of the bankruptcy provisions;

(c) Failing to make appropriate findings of fact and conclusions of law as required by the Federal Rules of Civil Procedure in those litigated adversary proceedings where the bankruptcy default clauses were at issue.

FACTS

The Debtor, D. H. Overmyer Co., Inc. (Virginia), leased a large warehouse in Richmond, Virginia, from Appellee and from time to time thereafter subleased space in the premises. The Debtor was generally delinquent in the payment of rent. Mr. Coleman Brydon, the Landlord's witness and manager of the warehouse in Richmond, Virginia, when

questioned about the Debtor's payment of rent, testified as follows: (transcript 73 B 1160, dated April 18, 1974, p.14).

"Q. I don't think it's necessary to go in back of 1973, but tell the Court something of the rent history of Overmyer?

A. Well, the rent history of Overmyer - - I will take '72 as an example. I will have to take '72 because I don't have it for '73.

Starting in January of 1973 (witness intended 1972) is when we started sending out notices. Before this time we had not sent out any delinquent notices. As a result, their payments went - - these are the number of days late - - from twenty-nine in January, five, twenty-nine days, thirty-five days, twelve days, thirty-three, twenty-seven, twenty-five, twenty-two days and ninety-seven days late, sixty-seven and seventy-seven days late.

So there was a trend towards the end of the year, towards the end of 1972, to get slower and slower."

On June 22nd and again on June 30th, 1973, Appellee notified the Debtor in writing that it was delinquent in the payment of rent and served a default notice on the Debtor as required under the terms of the lease for July rent due June 20, 1973. The Debtor tendered a check in payment of July rent which was returned for insufficient funds. The Debtor was then served with a termination notice dated July 23, 1973, as provided for in the lease, and on August 8th, 1973, <u>peacefully surrendered possession to the Landlord.</u> The Landlord has been collecting rents since August 9th, 1973, and before October 15th, 1973, had entered into new

leases with all tenants except one.

On November 16th, 1973, the Debtor (not in possession) filed a petition for arrangement under Chapter XI, Section 322, of the Bankruptcy Act. On April 18th, 1974, a hearing was held before Judge Babbitt on the issues of whether the Appellee has a right to retain possession of its building, and whether the lease with the Debtor had been terminated as of August 8th, 1973, for failure to pay rent. The Court found in favor of the Appellee and ordered that the lease between the Appellee and the Debtor terminate effective as of August 8th, 1973, and further ordered surrender of the premises to the Landlord effective as of July 31st, 1974.

## POINT I

### WHEN THE DEBTOR FAILED TO PAY RENT THE LANDLORD HAD A RIGHT TO POSSESSION AND TO TERMINATE THE LEASE

Appellee had the right to terminate its lease for non-payment of rent by reason of the terms of its lease.

Section 3.01 of the lease required Overmyer to make rental payments by the twentieth (20th) of each month. Failure to make a rental payment by the 20th of the month and continued failure to make such payment within ten (10) days after notice of delinquency by Carpenter constitutes an

event of default. Section 15.01 of Lease. Overmyer's failure to cure such default within fifteen (15) days after Carpenter's notice to cure would give Carpenter the right immediately to terminate the Lease, re-enter the premises, and collect rent from Overmyer's sublessees. Sections 15.02 and 7.01 of Lease.

Overmyer failed to make the rental payment due June 20, 1973. On June 22, 1973 (and again on June 30, 1973), Carpenter notified Overmyer that Carpenter had not received the June 20 rental payment. On July 23, 1973, Carpenter again notified Overmyer of its default with respect to the June 20 rental payment and requested Overmyer to take action to cure the default. However, Overmyer continued in default, and on August 8, 1973, Carpenter informed Overmyer (1) that Carpenter elected to and did thereby terminate the Lease and (2) that Carpenter was exercising its right of re-entry. Hence, since August 8, 1973, Carpenter has possessed as its own the property located at 2700 Jefferson Davis Highway, Richmond, Virginia.

Virginia law clearly affirms Carpenter's termination of Overmyer's Lease and re-entry of the premises. Jabbour Bros. v. Hartsook, 131 Va. 176, 108 S.E. 684 (1921);

Virginia Iron, Coal and Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925); Va. Code, § 55-79.

In Jabbour Bros. v. Hartsook, supra, lessor demised premises to lessee for three years. The lease provided for monthly rental payments on the first day of each month and "that if said rent shall at any time be in arrears and unpaid, ... lessor may cause a notice to be left on the premises, of his intention to determine the same, and at the expiration of ten days from the time of leaving such notice, this lease shall absolutely determine." 131 Va. 177-178. When lessee became in arrears on the rent, lessor gave notice of termination. When lessee did not cure his default within ten days, the lease terminated. Five days after the lease terminated, lessee tendered the rent arrearages which lessor refused to accept. Holding that the lessor rightfully repossessed the premises, the Supreme Court of Virginia stated:

> "*** the tender *** of the rent in arrears, being after such termination, was too late to prevent the termination which had already occurred. ***
>
> This being so, all the other matters in controversy in the case &&& become immaterial and, hency, need not be dealt with in this opinion.
>
> The seventh clause of the lease provides that if the rent shall 'at any time be in arrears and unpaid,' the lessor may terminate the lease at the expiration of ten days from the time of giving the notice, such as was given

as aforesaid. Hence, neither the common law rules on the subject of what a landlord must do to terminate a lease because of non-payment of rent, nor the statute in Virginia on the subject, have any application. The subject is governed and controlled in the case in judgment by the express contract of the parties and by the action of the lessor in accordance therewith.

We are, therefore, of opinion that there was no error in the action of the trial court in setting aside the verdict of the jury and in entering judgment for the lessor."

131 Va. 184-185.

In Virginia Iron, Coal and Coke Co. v. Dickenson, supra, an employee leased one of his employer's houses. The lease provided that the employee could occupy the house "as long as the lessee shall be in the employ of the lessor *** provided, however, that the lessor may terminate this lease at any time by giving the lessee five (5) days' notice of its election so to do." 143 Va. 254. The lease further provided that "whenever this lease is terminated *** it shall be lawful for the lessor, or any person or persons by it so directed, to enter upon and dispossess him and take possession of said premises, using such force as may be necessary for that purpose ***." The company discharged the employee and gave him written notice of termination as provided by the lease, but the employee did not vacate the premises. Thereafter, the company removed the employee's belongings

from the house, after which the employee brought suit alleging damages to his goods. Holding that the company properly evicted the employee, the Supreme Court of Virginia stated:

> "The correctness or incorrectness of the ruling of the trial court upon nearly all of these questions is dependent upon whether the court properly conceived the rights of the parties under the contract. This is the primary question therefore to be determined.
>
> Not only do the facts show, but the contract clearly establishes the fact, that the plaintiff occupied the company's premises solely by virtue of the fact that he was an employee, and that his right to occupy the premises was determined wholly by the contract which, while its terms may appear harsh, he, sui juris and compos mentis, had signed it and was bound by its terms. Thus he knew that when his employment by the company ceased, by the terms of his contract, his right to occupy the company's premises ceased. He knew that if he received five days notice to vacate his right to occupy the premises ceased, and it was his duty to vacate whether he had paid the rent provided for or whether he was willing and ready to pay it or not. He knew that, under the terms of his contract, if he did not vacate upon the happening of either of these events, the company had a right to remove his effects from their premises forthwith and to use such force as might be necessary for that purpose. The right of the company to dispossess him was not dependent upon whether it was convenient to the plaintiff or whether he had secured another house to move his effects into. He knew he was not an employee of the company and he knew he had received notice under the contract to vacate."

143 Va. 256.

"According to the weight of authority, a provision in a lease giving to the landlord the right on certain contingencies, to re-enter without process or by such force as

is necessary, is valid." 6 A.L.R. 3d 177, "Right of Landlord Legally Entitled to Possession to Dispossess Tenant without Legal Process." Thus, the Virginia Rule is also the majority rule in the United States.

Moreover, Virginia has by statute recognized a landlord's right to repossess his premises upon a tenant's default in the payment of rent:

> "Va. Code, § 55-79. Effect of provision for reentry by lessor. -- If in a deed of lease it be provided that 'the lessor may reenter for default of *** days in the payment of rent, or for the breach of covenants,' it shall have the effect of an agreement that if the rent reserved, or any part thereof, be unpaid for such number of days after the day on which it ought to have been paid, or if any of the other covenants on the part of the lessee, his personal representative or assigns be broken, then, in either of such cases, the lessor, or those entitled in his place at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may reenter, and the same again have, repossess and enjoy, as of his or their former estate."

Section 55-79 expresses Virginia's policy favoring a landlord's right to repossession upon a tenant's default. And, notwithstanding § 55-79, the parties may choose to control their rights by contract -- as in the instant case. Jabbour Bros. v. Hartsook, supra.

In the case at bar it was not a condition of the lease (as Appellant appears to argue) that the Landlord wait for more than a month for unpaid rent to accrue, or for other breaches to occur. Norwas it necessary for the Appellee to wait until the Appellant filed a petition in bankruptcy to invoke the bankruptcy clause, and to wait further for the court to decide whether or not to allow termination and possession. The Landlord had the absolute right to rely on the terms of its lease, and it chose not to invoke the bankruptcy clause which was written for the benefit of the Landlord -- not the Debtor. The facts are that the Debtor surrendered possession after receiving the default notice and later the termination notice as provided for in the lease. Dispossess proceedings were not instituted in Virginia to obtain possession of the building as this was unnecessary. The Debtor simply "walked out" and turned over the building to the Landlord after receiving notice to vacate.

## POINT II

### THE RECEIVER IS NOT ENTITLED TO POSSESSION OR TO COLLECT RENTS HAVING FILED ITS PETITION THREE MONTHS AFTER THE LANDLORD WENT INTO POSSESSION

The Appellee is one of the few landlords (perhaps the only landlord) in this proceeding which had possession of its property and had entered into new leases with its tenants prior to the time of the filing of the bankruptcy petition. In Remington on Bankruptcy, Volume 3, page 28, the general rule is stated that -

> "Where, for other reasons, a lease has already expired or been terminated at the time of filing of the bankruptcy petition, the trustee in bankruptcy of the tenant comes into nothing by way of a property interest, as there is nothing to come into. (In re Van Da Grift Motor Car Co. 192 F 1015, 27 ABR 474 (1912, DC Ky). Bankruptcy of a lessee does not prevent termination of the lease for any reason which would permit its termination in the absence of bankruptcy. (In re Lindy-Friedman Clothing Co. 275 F 453, 47 ABR 246 (1921, DC Ala), affd 285 F 22, 1 ABR NS 722.) But the trustee has 60 days under § 70 (b) of the Bankruptcy Act in which to adopt or reject an unexpired lease, if it has not already been effectively forfeited or terminated."

The point which has been made by the Appellant that the Landlord did not invoke the bankruptcy default clause is meaningless since the lease in evidence, dated December 9th, 1968, between the parties was stipulated to at the time of the hearing before Judge Babbitt on April 18th, 1974,

(transcript of proceedings No. 73 B 1160, p. 4). This lease, which is typical of all other leases, contains a bankruptcy clause (Article 15 of lease dated December 9th, 1968) which the Court has the right to adopt in its decision. No evidence was introduced by the receiver indicating that the Landlord had waived the bankruptcy default clause in the lease, nor was evidence introduced to support the doctrine of estoppel. Since the lease was part of the evidence, the Court, sitting in equity, has the right if it so chooses to terminate the lease by invoking the bankruptcy default clause even though this contention was not urged by the Appellee for the reasons hereinabove set forth. The Landlord had not terminated the lease and repossessed the building because of bankruptcy; the Landlord terminated the lease before the petition was filed (transcript 73 B 1160, dated April 18th, 1974, p. 10).

If the Court should determine that the lease was not terminated for non-payment of rent on August 8th, 1973, the lease terminated automatically pursuant to its terms when the petition was filed since the Landlord was in possession and had notified the Debtor in writing that it had elected to terminate.

## CONCLUSION

This Court should sustain the Judgment and Orders of Judge Babbitt set forth in his Opinion dated July 23rd, 1974, and disallow the appeal of the Appellant, Robert P. Herzog, for the reasons herein set forth.

Respectfully submitted,

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Dated:
September 5th, 1974

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